CHI LIUNG HOLDINGS SDN. BHD.

v.

SOON KOK SENG (PELIKUIDASI CHI LIUNG & SONS SDN. BHD. DALAM PENGGULUNGAN)

HIGH COURT MALAYA, KUALA LUMPUR
DATUK K.L. REKHRAJ JC
[ORIGINATING SUMMONS NO. D2-24-82-94]
23 FEBRUARY 1996

COMPANY LAW: *Liquidator - Removal - Liquidator also auditor and sole signatory to cheques - Whether sufficient cause for removal - Liquidator obtaining ex-parte order in separate proceedings - Non-disclosure of material facts in obtaining ex parte order - Test for materiality - Failure to file affidavit explaining liquidator's actions - Whether liquidator-cum-auditor could charge double fees.*

The defendant who was then the auditor of Chi Liung & Sons Sdn. Bhd. (in liquidation) ("the company") was appointed its liquidator under a members voluntary winding-up resolution dated 14 September 1991. The said resolution provided for the bank account in liquidation to be operated and signed by the liquidator and countersigned by the managing director, Datin Chong Mooi Lan and, in her absence, by Chong Ah Mooi @ Chong Hsueh Hui.

Subsequently, the plaintiff, the majority shareholders in the company, applied by the originating summons herein to remove the liquidator. On 29 January 1994 Rahmah Hussain J adjudged to the effect that the plaintiff had not shown a good cause for the removal of the defendant as liquidator and instead ordered the defendant to carry out certain actions including taxing his costs and remuneration as liquidator ("the said Order").

Ten months after the said Order the plaintiff took out a summons in chambers (encl. 21) herein to remove the liquidator this time on the ground that the bank account of the company was being operated solely by the defendant who had also failed to file his bill of costs for taxation pursuant to the said Order.

Subsequent to the filing of enc. 21 the plaintiff became aware of an *ex parte* order having been taken out by the defendant in separate proceedings in the Shah Alam High Court touching on the authority of the signatories to the cheques of the company in liquidation which was contrary to the said resolution.

The defendant took the preliminary objections that the said Order was final and that if there was a fresh complaint against the liquidator the proper course for the plaintiff was to commence fresh proceedings or in the alternative the plaintiff ought to have appealed against the said Order.

The preliminary objections were overruled and the Court put the defendant on notice that his action, *inter alia* in proceeding with *ex parte* order in the Shah Alam High Court, required explanation and directed him to file an affidavit of satisfactory explanation to be available for the hearing on 17 February 1996.

At the hearing, although the defendant claimed to have filed the affidavit, the registry records did not show any such filing.

Held:

[1] The Order dated 29 December 1994 did not preclude any party to introduce fresh cause for the removal of the liquidator. The Court accordingly overruled the preliminary objections reserving in itself the inherent jurisdiction under O. 92(4) of the Rules of the High Court 1980 and accordingly in the interest of justice made a ruling so as not to allow a party to rely on technicalities to his advantage.

[2] As the affidavit of satisfactory explanation was not properly before the Court, as the directed question remained unanswered the Court had no other alternative but to proceed to remove the liquidator forthwith and to appoint another in his place as this was the only course of action now left open to be adopted in the best interest of the liquidation as a whole. In coming to this conclusion the Court took note of:

(i) the unexplained conduct of the defendant in proceeding in a totally different Court and obtaining an *ex parte* order permitting him to be the sole signatory to all the cheques issued by himself for and on behalf of the company liquidation.

(ii) the unexplained reasons as to why he had not made full and frank disclosure of all facts to the Shah Alam High Court;

(iii) the defendant's failure to serve a copy of the *ex parte* application on the shareholders and/or the solicitors on record of the plaintiffs'

(iv) the defendant's failure to disclose at the earliest opportunity to this Court of the *ex parte* order.

[3] The test as to materiality of facts in relation to disclosure is objective, to be decided upon by the Court and it is not open to the defendant or to his solicitors to decide as to what to disclose and what to suppress. Hence it can be no excuse for the defendant or for that matter anyone to come before this Court and to plead that he was genuinely unaware or believed that facts were irrelevant.

[4] The defendant as liquidator, auditor and sole signatory of the company's bank account in liquidation was exercising powers in a situation where there was a possibility of conflict of interest. This by itself was sufficient

cause for the Court to interfere in the interest of justice and remove the defendant from his office as liquidator.

[5] The defendant as a liquidator-cum-auditor could not enrich himself doubly by charging fees for the liquidation and fees for writing the books of accounts and must account for all such fees collected after his appointment as liquidator.

[Defendant removed as liquidator. New liquidator to be appointed]

Cases referred to:
Kandiah Peter v. Public Bank Bhd. [1994] 1 MLJ 119 ***(refd)***
Castle Fitness Consultancy Pte. Ltd. v. Manz [1990] ***(cit)***
Re British Nation Life Assurance Association V.C.M. [1872] (April 27 - May 4). ***(refd)***
Chua Boon Chin v. J.M. McCormack & Ors. [1979] 2 MLJ 156 ***(refd)***
Re Adam Eyton Ltd. [1887] 36 Ch. D 299. ***(foll)***
Re Edennote Ltd. Tottenham Hotspur Plc. & Ors. v. Ry man & Anor. [1995] 2 BCLC 267 ***(foll)***
In Re Gertzenstein Ltd. [1936] 3 341 (Ch. D) ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 92(4)

For the plaintiff - Taiyub Khan (G.T. Rajan with him); M/s. Thaiyub Khan Othuman & Co.
For the defendant - K.S. Tay; M/s. K.S. Tay & Rashid

JUDGMENT

K.L Rekhraj JC:

There are two applications before this Court by the plaintiff::

(1) Enclosure 21

(i) That the defendant be removed as liquidator of Chi Liung & Sons Sdn. Bhd. (In Liquidation);

(ii) A new liquidator be appointed in place of the defendant and such appointment and duties be subject to the supervision of the Court;

(iii) Such further and other order with liberty to apply.

(2) Enclosure 29

(i) That the defendant do supply to the plaintiff the names, addresses and the account numbers of all the banks where the liquidator operates the accounts of Chi Liung & Sons Sdn. Bhd. (In liquidation);

(ii) The defendant to supply copies of monthly bank statements beginning from the time he was appointed;

(iii) That the defendant do supply to the defendants copies of all sale and purchase agreements in the sale of the company's property;

(iv) That the defendant do supply to the plaintiff a statement of all monies received by him and fees he had changed from time to time since his appointment.

Brief Facts

The defendant, Mr. Soon Kok Seng was appointed a liquidator of the company under the members voluntary winding-up resolution dated 14 September 1991. At the time of his appointment as liquidator by Datin Chong Mooi Lan, the managing director of the company in liquidation, he was already then an auditor of the company and upon his appointment as such, he continued both the functions of the auditor cum liquidator of the company in liquidation, charging fees for his works done both as auditor and as a liquidator. The fees for liquidation was agreed upon by Datin Chong and the liquidator pursuant to the resolution of the company dated 14 September 1991, under which resolution, the liquidator was to be paid a sum of RM10,000, as upfront and in addition thereto, he was to be paid progressively one per cent on realizable value of all assets. It was also resolved then that the bank account in liquidation shall be operated and signed by the liquidator and countersigned by Datin Chong Mooi Lan; and in her absence by Chong Ah Mooi @ Chong Hsueh Hui.

The finality to the liquidation progressed very slowly, and with it the relationship between Datin Chong, the other shareholders, and the liquidator became strained. All the required meetings of the company in liquidation were aborted. The plaintiff being the major shareholders owning about eighty five per cent of the share-holding in the liquidation company instead of calling for the shareholders meeting to remove him, chose to proceed with an originating summons to remove the liquidator. The said originating summons was heard by Justice Puan Rahmah Hussain on 29 December 1994 when she adjudged to the effect that the plaintiff had not shown a good cause for the removal of the liquidator and directed the liquidator that he should proceed to:

(i) send proper notices to the shareholders in future;

(ii) all costs and remunerations of the liquidator so far claimed by him to be taxed by the Senior Assistant Registrar;

(iii) all properties or assets of the company in future to be sold by public auction; and

(iv) each party to bear its own costs.

(herein after called the said Order.)

After a period of ten months of the said Order, the plaintiff again took out a summons in chambers (encl. 21) to remove the said liquidator; this time on the ground and supported by an affidavit of Chong Ah Guan, the managing director of the plaintiff company deposing to the fact that the bank account of the company under liquidation required two signatories but he believed the liquidator was operating singularly; and that the liquidator had failed to comply with that part of the said Order which required him to file his bill of costs and have it taxed by the Court.

Subsequent to the filing of encl. 21, the plaintiff came to be aware of an *ex-parte* order having been taken out by the liquidator in the Shah Alam High Court under Originating Summons 24-463-95 (hereinafter called the "*ex-parte* Order") which was materially detrimental and in total contrary to the resolution that was passed by the company touching on the authority of the signatories to the cheques of the company in liquidation. The plaintiff then proceeded with a second application (encl. 29) dated 20 December 1995 and both these applications came for hearing before me on 26 January 1996 at which hearing the liquidator's solicitor Mr. K.S. Tay informed the Court that he was taking preliminary objections to the plaintiff's applications. The Court enquired of the said solicitor as to whether he had given prior notice of his such intention to the plaintiff's solicitors; so as not to be in breach of the Rules regulating the practice and etiquette of the Bar. Mr. Tay informed that he had not done so; and wanted the hearing to be adjourned to enable him to comply with the Etiquette Rules. The Court adjourned the hearing with costs to the plaintiffs and fixed the hearing for 5 February 1996. On that date the defendant produced a medical certificate to show that his solicitor was unfit to attend Court; and the hearing was thus adjourned to 10 February 1996.

On 10 February the defendant's solicitor took the preliminary objections:

(i) that the initial action (encl. 1) taken by the plaintiff in the originating summons supported by the affidavit of Mr. Chong Ah Guan affirmed on 16 April 1994; and the present summons in chambers encls. (21) and (29) are duplicity of actions; claiming that the decision or the order of the Judge made on 29 December 1994 was final;

(ii) that if there was a fresh complaint against the liquidator; the proper course for the plaintiff was to proceed by another originating summons and not by a summons in chambers; or in the alternative the plaintiff ought to have appealed against the order of the Judge.

Mr. G.T. Rajan in reply to the objections raised said that this application by summons in chambers was not a new cause but a follow-up on the order dated 29 December 1994 in the defendant's non-compliance of the Order and in any event it cannot be said that the Order was a finality order; as this Court had the inherent jurisdiction under O. 92(4) Rules of the High Court to allow a follow-up action on a fresh cause shown:

that is; the defendant had without the knowledge of the plaintiff, on an *ex-parte* application, and without any disclosure to the Court of all the relevant facts had appointed himself as the sole signatory.

In over-ruling the preliminary objection, I reminded myself of the decision of His Lordship the Chief Justice YAA Tan Sri Dato' Seri Haji Mohd. Eusoff Chin in *Kandiah Peter v. Public Bank Bhd.* [1994] 1 MLJ p. 119 @ 123. "That it is settled law that in order for the doctrine of *resjudicata*, cause of action estoppel or issue estoppel to apply the earlier proceedings must have resulted in a **final judgment or decree**."

Reading the Order dated 29 December 1994, it merely says "that the plaintiff has not shown a good cause for the removal". It did not say the plaintiff's claim is dismissed and in any event this does not preclude any party to introduce fresh cause for the removal of the liquidator. I accordingly over-ruled the objections reserving in myself the power of the inherent jurisdiction of the Court under O. 92(4) Rules of the High Court, 1980 which reads:

> For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of Court.

and accordingly in the interest of justice, made ruling so as not to allow a party to rely on technicalities to his advantage, as is shortly to be evident.

The Court then directed the defendant who was present in chambers to explain his conduct by a sworn affidavit as to:

(i) why he had proceeded in another Court in Shah Alam, Selangor, with an *ex-parte* application *vide* Originating Summons **No. 24-463-95** through a different firm of solicitors M/s. Nik Saghir & Ismail for an *ex-parte* order authorising himself to be the sole-signatory to all the banks accounts;

(ii) why he had chosen to file that application in the Shah Alam High Court, when it could have been filed in this Court, as the parties were already in issue before this Court; and more for the fact the said *ex-parte* application in Shah Alam was taken out after the order of 29 December 1994;

(iii) why did he not make the application *inter-parte*, when he well knew that there were solicitors on record for the plaintiffs; see *Castle Fitness Consultancy Pte. Ltd. v. Manz* [1990] 1 MLJ p. 141;

(iv) why did he not disclose to the Shah Alam High Court of the proceedings that were in progress before the High Court Kuala Lumpur.

(v) why he did not disclose to the Court in his supporting *ex-parte* application that pursuant to the resolution of the company dated 14 September 1991, there was another named person who could have and was so authorised to sign all cheques together with the liquidator in the absence of Datin Chong Mooi Lan.

The Court then put the liquidator on notice that his action in so proceeding with an *ex-parte* application, without making full, fair and complete disclosure to the Shah Alam High Court, amounted to a deliberate suppression of facts with intent to make himself all **omnipotent**, **omnipresent** and **omniscient** in his relationship with the company: as an auditor, the liquidator and the sole-signatory to the company's bank account i.e. three portfolios incorporated in one person. That by his act he had now placed himself in a serious conflict of position in the exercise of his separation of powers and duties and/or in a conflicting fiduciary relationship; and unless he gave a satisfactory explanation, the Court would invoke adverse inferences on his conduct. Mr. Soon was then ordered by this Court to file an affidavit in explanation to rebut any such inference and he well understood that he had to do so by 17 February 1996.

On 17 February 1996 when the case was called-up, the Court did not have before it the said affidavit of explanation by Mr. Soon. Upon inquiry, the defendant's solicitor Mr. K.S. Tay informed the Court that his firm had filed the said affidavit with the Court the previous day and had served a copy thereof on the defendant's solicitors. When asked whether he had any evidence of filing, more particularly the receipt of praecipe payment, Mr. Tay informed the Court that he had directed his clerk to file, and he cannot now vouch as to whether or not he had infact filed the same in Court. Mr. Thaiyub Khan for the plaintiff informed the Court that an affidavit was served at his office at 3.59 p.m. the previous day; but he was objecting to the said affidavit for reasons that it was not made in the usual required norms and forms. I then directed the Senior Assistant Registrar of the High Court who was present at the hearing to check with the registry as to whether or not such an affidavit had been filed. The Court was informed that the registry records do not show of any such filing; and when so informed to the defendant's solicitors, the defendant's solicitors wanted a postponement to regularise the affidavit to meet the required norms and forms.

As the affidavit was not properly before the Court, and as the directed questions remained unanswered the Court had no other alternative, but to proceed to remove the liquidator forthwith and to appoint another in its place, with liberty to the plaintiffs to apply, as this was the only course of action now left open to be adopted in the best interest of the liquidation as a whole. In coming to this conclusion the Court had to take note of:

(i) the unexplained conduct of the liquidator in proceeding in a totally different Court and obtaining an *ex-parte* order permitting him to be the sole signatory to all the cheques issued by himself for and on behalf of the company in liquidation.

(ii) the unexplained reasons as to why he had not made full and frank disclosure of all the facts to the Shah Alam High Court; as would have been necessary before the Court gave an *ex-parte* order in terms.

(iii) that he had failed to serve a copy of the *ex-parte* application on the share-holders of the company and or on the solicitors for the company; who were already on record acting for the plaintiff.

(iv) that he had failed to disclose at the earliest opportunity to this Court of the *ex-parte* order; such non-disclosure amounted to a deliberate suppression of material facts by the defendant.

The test as to materiality is objective to be decided upon by the Court, and not open to the defendant or to his solicitors to decide as to what to disclose and what to suppress. Hence, it can be no excuse for the defendant or for that matter anyone to come before this Court and to plead that he was genuinely unaware or believed that those facts were irrelevant. In my opinion these facts were of great importance to the "**weighing operation**" for the Shah Alam High Court to make a decision as to whether or not to grant the *ex-parte* order. To me it is now immaterial whether or not that non-disclosure was "**innocent**" but it is nonetheless a very important factor to take into account in coming to a decision in my exercising **that discretion** as to whether or not **this is a cause sufficient to remove the liquidator** and it appears on the totality of the evidence that the non-disclosure was either intended or manipulated to bring about the intended result.

The plaintiff's application is made under s. 266 of the Companies Act 1965 which reads:

> The Court may **on cause shown** remove a liquidator and appoint another.

And this Court has that power to remove the liquidator **if that cause is shown**; and the question for this Court is **what constitutes the cause**? It has been held in *Re Marseilles Extension Railway and Land Company - Law Report 4 Eq. 692*; and again In *Re British Nation Life Assurance Association* V.C.M 1872 (April 27 - May 4):

> That the Court may remove a liquidator appointed by a company even without there being any misconduct alleged against him, if it appeared on the whole that it was for the benefit of the company in liquidation that he should be removed.

In *Chua Boon Chin v. J.M. McCormack & Ors.* [1979] 2 MLJ p. 156 at 158 where Justice D' Cotta said "In determining the question whether under all the circumstances of the present case, due cause has been shown for the removal of the liquidator. I am content to be guided by the principles laid down in *Re: Adam Eyton Ltd.* [1887] 36 Ch.D. 299 and to the judgment of Cotton LJ at p. 303 where in commenting on the Judgment of Jessel MR in the case of *Re: Sir John Moore Gold Mining Co.* he goes to say:

> **If the Court is satisfied on the evidence before it that it is against the interest of the liquidation,** by which I mean all those who are interested in the company being liquidated; **that a particular person should be made a liquidator, then the Court has the power to remove the present liquidator** and of course then to appoint some other person in his place.

In the same case, Bourne LJ at p. 306 said:

> **the due cause** is to be measured by reference to the real, substantial, honest **interest of the liquidation** and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the **substantial and real interest of the liquidation**.

Again in *Re Edennote Ltd. - Tottenham Hotspur Plc. & Ors. v. Ryman & Another* [1995] 2 BCLC at p. 267 it was said:

> that in order to effect the removal of the liquidator the **Court needs only to be satisfied that it is for the general advantage of those interested in the assets of the company that the liquidator be removed**, must be read in the context of the facts of the case and that very special circumstances must exist before the power can be exercised in a case in which no personal misconduct or unfitness can be shown on the part of the liquidator. The words of the statute are very wide and it would be dangerous and wrong for a Court to seek to limit or define the kind of cause which is required. Circumstances vary widely, **and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or his conduct of the particular liquidation**.

As I said earlier, the liquidator has become all pervading "**3 into 1**"; he is the auditor, the liquidator, and the sole-signatory to the company's bank account in liquidation. There is no one left to question him on the separation of powers which are now exercised by the one and the same person; completely performing himself in absolute total violation of the rule that no one should act in a capacity where there is the possibility of a conflict of interest. To me, notwithstanding any other cause shown or not this by itself was or is a sufficient cause to interfere in the interest of justice and remove him from his office.

As a liquidator cum auditor he has in addition to his liquidation fees been charging the company fees for writing the books of account. In my considered opinion he cannot enrich himself doubly by charging separate fees for separate

works by being both Dr. Jekyll and Mr. Hyde. He must be made to account for all such fees so collected by him after his appointment as a liquidator; for it was held in the case of *In Re Gertzenstein Ltd.* [1936] 3 AER 341 (Ch. D) that where a solicitor who being one of the two liquidators of a company was deprived of his legal costs which he had earned by acting as the liquidator's solicitors for the purposes of litigation.

Taking into consideration all these surrounding circumstances and for or in the best interest of the liquidation as a whole, I accordingly made an order:

(i) that the liquidator be removed forthwith and a new liquidator be appointed in his place from M/s. Price Waterhouse and in the event of their refusal; then one be appointed from Coopers & Lybrand with liberty reserved in the plaintiff to obtain such other directions as may be necessary from the Court;

(ii) that all costs of the plaintiffs be taxed and to be paid by the liquidator personally; and

(iii) that the rest of the prayers as sought under encl. (29) do stand adjourned to a date if necessary after the new liquidator has taken possession of the books of accounts.

Reported by Jasmesh Kaur